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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ELSEVIER INC.,)
Plaintiff,)
Case No. 08 CIV 5482 (GBD)
-against-)
DEFENDANT'S STATEMENT OF
ENCYCLOPAEDIA BRITANNICA, INC.,)
UNDISPUTED FACTS PURSUANT TO
Defendant.)
LOCAL CIVIL RULE 56.1

Pursuant to Local Civil Rule 56.1 of the United States District Court for the Southern District of New York, defendant Encyclopaedia Britannica, Inc. (“Britannica”), by its attorneys Loeb & Loeb LLP, respectfully submits the following statement of undisputed material facts as to which there is no genuine issue to be tried:

1. By agreement memorialized by letter dated August 4, 1997 ("License Agreement"), Novartis Pharmaceuticals Corporation ("Novartis") licensed Britannica to use certain copyrighted medical illustrations ("Illustrations") on Britannica's website. (Bowe Dec. ¶ 2, Exhibit A).

2. Plaintiff claims it acquired the copyright interest to the subject matter of the license by a string of corporate mergers and copyright assignments. (Cmpl't ¶¶ 10, 11).

3. The License Agreement provides, in relevant part, "I am in receipt of your check in the amount of \$20,000.00 as the fee for permission to include [Illustrations] in the new edition of the Encyclopedia Britannica CD-ROM, as well as use of these illustrations on your website subscriber base of up to 10,000 members (please refer to letter dated June 1, 1997 for additional subscribers)." (See Bowe Dec. ¶ 2, Exhibit A).

4. Britannica paid Novartis \$20,000 for this license. (Cmpl't ¶ 9; Bowe Dec. ¶ 3).

5. There is another agreement between Britannica and Novartis dated June 1, 1997, regarding use of the copyrighted medical Illustrations when Britannica's website subscriber base exceeded 10,000 members and possibly other uses ("Additional Agreement"). (See Bowe Dec. ¶ 2, 4, Exhibit A).

6. Neither Britannica nor Plaintiff knows the terms of that Additional Agreement. (Bowe Dec. ¶ 8, 11).

7. Neither party has a copy of this key Additional Agreement referenced in the License Agreement. (Bowe Dec. ¶ 8).

8. Britannica, having moved in the intervening years, no longer has any documents concerning the negotiation and execution of the Additional Agreement. (Bowe Dec. ¶ 8, 9).

9. The whereabouts of the authors of the License Agreement, who may not even be the authors of the Additional Agreement, is not known. (Bowe Dec. ¶ 10-12). Nor does Britannica even do business with Novartis currently. (Bowe Dec. ¶ 12).

10. Despite the fact that the parties continued to do business with each other in subsequent years, Plaintiff never raised entitlement to additional fees from Britannica's ongoing

use of the Illustrations until recently and offers no explanation for waiting eleven years to raise these claims. (Bowe Dec. ¶ 5).

11. Subsequent to entering into the License Agreement, Novartis and Britannica entered in other license agreements concerning similar content. (Bowe Dec. ¶ 5).

12. At no time, did Novartis claim that Britannica was breaching the License Agreement, the Additional Agreement or engaging in any acts of copyright infringement. (Bowe Dec. ¶ 5).

13. It was not until last year when Plaintiff contacted Britannica that Britannica became aware that Plaintiff claimed that Britannica was acting in breach of the Additional Agreement and/or committing copyright infringement. (Bowe Dec. ¶ 5).

14. Britannica has been deprived of the ability to mitigate any damages Plaintiff may be entitled to recover. (Bowe Dec. ¶ 7).

15. Had Plaintiff, Novartis, or any of the other alleged predecessors or successors in interest ever notified Britannica of the claims that are the subject of this suit, Britannica could have promptly addressed them either by referring to the appropriate documentation (if it existed at the time) or by removing the Illustrations. (Bowe Dec. ¶ 7).

16. Britannica has long had many similar illustrations at its disposal, and it could have found suitable substitutes to replace the Novartis Illustrations. (Bowe Dec. ¶ 6).

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